84998-6

No. 40247-5

(Appeal from Pierce County Superior Court No. 08-2-09228-9)

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

ANGELA ERDMAN,

Appellant,

v.

CHAPEL HILL PRESBYTERIAN CHURCH; MARK J. TOONE, individually; and the martial community of MARK J. TOONE and "JANE DOE" TOONE,

Respondents.

AMICUS CURIAE BRIEF OF PRESBYTERY OF OLYMPIA

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I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Presbytery of Olympia ("Presbytery") is an intermediate governing body of the Presbyterian Church (U.S.A.) ("PCUSA"). The PCUSA has approximately 2.5 million members, 11,200 individual congregations and 21,000 ordained ministers. The PCUSA is a hierarchical church organized with layers of governing bodies.[1] The organizational structure of the PCUSA is set forth in the Book of Order ("BOO") published on a bi-annual basis.[2] At the top is the General Assembly of the PCUSA. Under the authority of the General Assembly are 16 synods, organized geographically by region and below that, 173 Presbyteries. A Presbytery, in turn, is comprised of its member congregations and Ministers of the Word and Sacrament. Respondent Chapel Hill Presbyterian Church ("CHPC") is a member congregation of the Presbytery of Olympia. Respondent Mark Toone ("Toone") is a Minister of the Word and Sacrament.

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[1] The Court of Appeals has previously identified the Presbyterian Church as a hierarchical church. See *Elvig v. Ackles*, 123 Wn. App. 491, 497, 98 P.3d 524 (2004).

[2] The Presbyterian Church USA is governed by the Book of Order ("BOO"). The BOO is mailed each year to the stated clerks and executives of the Synods and Presbyteries. It is also accessible online at http://www.pcusa.org/oga/publications/07-09-boo.pdf. Relevant excerpts from the 2007-09 version of the BOO are part of the Clerks' Papers on appeal. *See* CP 924-977. The Organizational government structure of the Presbyterian Church is set forth in Section G- 4.0300 of the BOO. The responsibilities of a Presbytery are set forth in Section G-11.0000 *et seq.* CP 950-966. See also CP 978-979, attaching relevant pages from the Presbyterian Church (U.S.A.) website, www.pcusa.org.

The Presbytery has an interest in maintaining the autonomy from governmental interference of its member congregations to determine the employment relationship between a congregation and its key staff members and to manage the relationship between the ordained elders of a particular congregation and Ministers of the Word and Sacrament. The Presbytery also has an interest in preserving and defending the adjudicatory mechanisms codified in the BOO. Finally, the Presbytery has a direct interest in this appeal as it was the entity charged with responding to third-party discovery, which was limited by the trial court. The trial court's actions on discovery involving the Presbytery are the subject of Ms. Erdman's first and second stated issues on appeal.

II. STATEMENT OF THE CASE[3]

In December 2007, Ms Erdman filed charges with the Presbytery against Pastor Toone of CHPC under the provisions set forth in the PCUSA BOO Section D-10.0000, alleging that he engaged in misconduct contrary to the Holy Scripture and Constitution of the PCUSA.[4] At the time of filing charges, Ms. Erdman was a member of CHPC's executive staff, serving as the Executive for Stewardship. She was also an ordained

[3] Presbytery sets forth those facts which relate specifically to its interests. It does not purport to give an entire overview of the factual record in this matter and refers the court to the Respondent's Counterstatement of the Case.

[4] Ms. Erdman's grievance against Pastor Mark Toone is found at CP 842-846.

elder in the PCUSA, subject to the provisions of the BOO, which provides in relevant part as follows:

> Elders are chosen by the people. Together with ministers of the Word and Sacrament, they exercise leadership, government, and discipline and have responsibilities for the life of a particular church as well as the church at large, including ecumenical relationships. ... BOO G-6.0302.

In her ordination vows, which are made for life, Ms. Erdman agreed to be governed by PCUSA polity and to abide by its discipline. BOO W-4.4003(d). The BOO also provides procedures for meting out church discipline. The "Rules of Discipline" are based on the traditional biblical obligation to conciliate, mediate and adjust differences without strife. BOO, D-1.0103. Formal disciplinary procedures are appropriate only after the party seeking redress fulfills his or her "duty to try (prayerfully and seriously) to bring about an adjustment or settlement of the quarrel [or] complaint." *Id.*

In accordance with the procedures set forth in the BOO, the Presbytery convened a three-member Investigating Committee ("IC") to investigate Ms. Erdman's charges against Pastor Toone.[5] After gathering and reviewing material from Ms. Erdman and Pastor Toone, meeting with witnesses and conducting investigation, the IC issued a letter dated May

[5] The relevant procedures for an Investigating Committee are set forth in Section D-10.0000 *et seq.* of the BOO, CP 970-977.

27, 2008 to the Stated Clerk of the Presbytery indicating its decision to decline to file charges because the IC had determined that the accusations could not be reasonably proved to a Permanent Judicial Commission of the Presbytery. CP 981. By letter dated the same day addressed to Ms. Erdman, the IC confirmed that it sought to make a thorough inquiry into the facts and circumstances of the alleged offense. CP 980. As the letter noted: "We have held many meetings, conducted numerous interviews with available witnesses and examined relevant papers, documents and records." *Id.* The letter concluded as follows:

> Angela, I want you to know that the Investigative Committee took the accusations you made very seriously. We also took the pain which you expressed very seriously. We realize the decision of the Investigative Committee may not seem to bring the resolution you hope for." *Id.*

Under the provisions of the BOO, section D-10.0303(a), Ms. Erdman could have appealed the determination of IC not to file charges to the Permanent Judicial Commission of the Presbytery. CP 974-975. She did not do so.

Shortly after filing charges with the Presbytery, Ms. Erdman filed a civil suit in Pierce County Superior Court against Chapel Hill and Pastor Toone, alleging various claims arising out of her employment with Chapel Hill and her termination by the session of Chapel Hill Church. CP 3-13.

The Presbytery was not a party to this lawsuit. On August 25, 2008, the Presbytery received a subpoena from Ms. Erdman's counsel seeking all documents and other materials related to the IC proceedings. CP 87-90. In response to the subpoena, the Presbytery, through its outside counsel, submitted a two-inch stack of documents, which included all documents gathered by the IC, documents submitted by the parties, emails generated by the parties or relating to the underlying controversy, as well as correspondence generated by the IC. CP 94. The Presbytery withheld from production just seven documents, each described with specificity in the September 20, 2008 letter from outside counsel for the Presbytery, addressed to counsel for Ms. Erdman. CP 93-94. The letter further stated as the basis for withholding the documents the Presbytery's concern that production of internal IC documents would reveal the thought process of the Committee, formed as an ecclesiastical tribunal, and production would thereby violate the Presbytery's First Amendment rights and privileges. *Id.* The letter complied in full measure with the requirements of CR 45.

By motion dated January 14, 2009, Ms. Erdman sought to compel production by Presbytery of the documents withheld. CP 75-82. After briefing to the court and oral argument, the trial court undertook an *in camera* review of the withheld documents. In its Order, the trial court denied the motion to compel, finding that the documents reviewed *in*

camera were privileged under the First Amendment and that the documents confirmed that the IC had considered all charges brought by Ms. Erdman. CP 180-181.

Subsequent to the trial court's January 23, 2009 Order, Ms. Erdman sought the deposition of Rev. Jon Schmick, chair of the Presbytery IC. In response to the deposition Subpoena, Presbytery filed a Motion to Quash. CP 312-315.[6] The trial court allowed the deposition, however, the court prohibited any inquiry into the thought process and internal deliberations of the IC, reasoning that such inquiry would impermissibly interfere with matters of church doctrine and theology and violate Presbytery's First Amendment rights.[7] CP 644-645.

Presbytery takes issue with Ms. Erdman's suggestion in its Statement of Facts that the Presbytery IC had "no incentive to conduct a thorough investigation" and that "it made no findings or decision on the underlying charges".[8] App. Brief at p. 14. The trial court determined

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[6] Ms. Erdman simultaneously filed a Motion Directing Compliance with Subpoena. CP 271-277.

[7] The deposition of Rev. Schmick proceeded under the parameters set forth in the trial Court's Order. The Presbytery is unaware of any subsequent Motion to Compel related to that deposition. To the extent that Ms. Erdman now contends that the limitation on the deposition of Rev. Schmick was erroneous, it should be noted that she never brought back to the trial court any particular deposition question she believed to have been allowable, but which was not answered by Rev. Schmick.

[8] Alleged negative behaviors by a pastor are matters of great concern to a Presbytery as they jeopardize the health of a congregation. In reality, Presbytery had every incentive to conduct a thorough investigation.

from its *in camera* review of the withheld documents that the IC had thoroughly addressed all charges presented to it. Moreover, the IC acted at all times in accordance with the BOO, which provides that if the IC determines that no charges are to be filed, it is to state that fact only and make no other findings or decision.[9] BOO D-10.0303. CP 974-975.

III. ARGUMENT

A. THE FREE EXERCISE AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT AND THE WASHINGTON STATE CONSTITUTION PRECLUDE THE CLAIMS WHICH WERE DISMISSED BY THE TRIAL COURT.

The First Amendment to the United States Constitution grants to religious organizations a unique position in our society. The Free Exercise clause prohibits Congress from making any law that restricts the freedom of religious unions to establish, follow or advocate their own vision of spiritual truth. The Establishment Clause similarly limits the power of the state to intrude into the religious sphere even where its purpose is benign. The State's position on matters involving the exercise of religion must always be one of neutrality. *School Dist. Of Abington Township, Pa v. Schempp*, 374 U.S. 203, 225 (1963).

These fundamental First Amendment principles are inherently implicated when it comes to matters involving the employment

[9] Under the BOO, a decision to file charges would have resulted in further proceedings, including a formal trial leading to findings and a formal decision. *Id.*

relationship between a church and those persons employed by the church as spiritual leaders. Here, Ms. Erdman challenged the decision of the Session of CHPC to end her employment as the Executive for Stewardship in filing claims for wrongful discharge and discrimination based on gender and religion. Ms. Erdman further alleged that CHPC negligently supervised and retained Pastor Toone. CP 3-13.

As set forth in detail in CHPC/Toone's brief, the record before the trial court and on appeal establishes that the decision to sever the employment relationship between Ms. Erdman and CHPC was motivated by a belief by the Session of CHPC that Ms. Erdman had violated the BOO and further violated her ordination vows as an elder. As such, any governmental intrusion by way of a court or jury challenging the decisions made by the CHPC Session would amount to an impermissible interference with religion in violation of both the First Amendment and its Washington constitutional counterpart, Art. 1, §11. *See Fontana v. Diocese of Yakima*, 138 Wash. App. 121, 157 P.3d 443 (2007); *Gates v. Seattle Archdiocese*, 103 Wash. App. 160, 10 P.3d 435 (2000).

Plaintiff's claims against CHPC for negligent supervision and retention of its pastor are similarly barred as held in *Germain v. Pullman Baptist Church*, 96 Wash. App. 826, 980 P.2d 809 (1999). Any court review of the relationship between CHPC and Rev. Toone would be an

impermissible entanglement as the relationship between CHPC and its pastor is governed exclusively by the BOO. *See also Elvig v. Ackles*, 123 Wash. App. 491, 98 P.3d 524 (2004).

1. Courts Must Give Deference to the Decision of the Presbytery Investigating Committee.

As Respondent establishes in its brief, long-standing federal law interpreting the First Amendment requires secular courts to defer to decisions of ecclesiastical tribunals of hierarchically-structured churches, such as the PCUSA. *See Serbian Eastern Orthodox Diocese for U.S. of America and Canada v. Milivojevich*, 426 U.S. 696 (1976). Washington appellate courts have similarly recognized the constitutionally-protected autonomy of an ecclesiastical tribunal of a hierarchically-organized church. *See Elvig v. Ackles, supra.* Presbytery will not re-state the well-articulated arguments of CHPC/Toone here.

Presbytery notes only that the PCUSA BOO sets forth highly detailed procedures for handling charges, which provide requisite elements of due process, including independent investigation and rights of review and appeal. As the appellate court noted in *Elvig* in a dispute involving the PCUSA, the church's {PCUSA's] adjudicatory process is mandated by the BOO's Rules of Discipline; it is not simply an " 'internal grievance procedure' " but rather "is inextricably intertwined with the

Church's religious tenants [sic] and is in actuality an integral aspect of its ecclesiastical mission." *Elvig, supra* at 500. After its review of documents and interview of witnesses, the Presbytery IC unanimously concluded that Ms. Erdman's allegations against Toone lacked merit. Pursuant to the procedures of the BOO, once the IC determined not to file charges, the IC had no authority to proceed further unless the complainant, Ms. Erdman, chose to have the IC's determination reviewed by the Permanent Judicial Commission, which she did not do. BOO D-10.0303. The trial court, upon its *in camera* review of key IC documents, expressly determined that the IC had reviewed all charges brought before it. CP 180-181.

Those charges, although relying upon scriptural and BOO authority rather than civil law, were based on the very same behaviors and conduct alleged to be at issue in certain of her claims in the civil suit. Abundant federal and state case law, including *Milivojevich* and *Elvig* mandate that the courts give deference to the IC's decision.

2. The "Ministerial Exception" Applies Here to Limit the Court's Ability to Review the Employment Relationship Between Ms. Erdman and Chapel Hill.

Under both federal and state case law precedent, courts have recognized a church may not be sued in civil court for decisions relating to the employment of its ministers. This is known as the "ministerial exception." *See, e.g., Elvig v. Ackles, supra.* In determining whether the

"ministerial exception" should apply to non-ordained individuals in key leadership positions in the church such as Ms. Erdman, Presbytery maintains that it is important to bear in mind the purpose and the principles underlying the "ministerial exception." Numerous federal courts have repeatedly concluded that in order to comply with the free exercise and establishment clauses of the First Amendment, the anti-discrimination provisions of Tile VII may not be applied to the church-clergy employment relationship.[10] Similar concerns apply under the Washington Constitution, Article 1, §11. The freedom of religion provisions of the Washington Constitution have been held to be even more protective of religious freedom than First Amendment of the US. Constitution. *State v. Balzer,* 91 Wash. App. 44, 954 P.2d 931, *rev. denied* 136 Wn.2d 1022, 969 P.2d 1063 (1998). Religious free exercise is a fundamental right of vital importance. *Id.*[11]

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[10] *See, e.g., Bollard v. Cal Province of the Soc'y of Jesus*, 196 F.3d 940, 946-47 (9th Cir. 1999) ("Because the plain language of Title VII purports to reach a church's employment decisions regarding its ministers, courts have had to carve a ministerial exception out of Title VII to reconcile the statute with the Constitution."); *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972) ("the application of the provisions of Title VII to the employment relationship existing between ... a church and its minister would result in an encroachment by the Sate into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment"); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985) ("Any attempt by government to restrict a church's free choice of its leaders thus constitutes a burden on the church's free exercise rights.").

[11] These principles form the underpinnings of previous Washington appellate court rulings in cases such as *Elvig*, adopting the ministerial exception for ordained ministers, *Fontana*, extending that exception to a Minister for Evangelism and *Germain*, ruling that a determination of whether a church acted improperly as to the retention or supervision of its pastor would require interpreting church's laws and construction.

Ms. Erdman argues here that the ministerial exception should not apply because Ms. Erdman's duties were primarily secular. Ms. Erdman's argument misses the key point of the ministerial exception. The rule exists to prevent governmental interference with the critical employment relationship between a church and its key staff charged with carrying out its vision and mission. The ministerial exception is necessary both to the free exercise of religion by churches in the selection of key employees and to prevent entanglement by courts in "second-guessing" that employment relationship. *See Fontana v. Diocese of Yakima, supra.*

The Ninth Circuit recently re-affirmed the "ministerial exception" and applied it to claims arising under the Washington Minimum Wage Act. *Rosas v. Corp. of the Catholic Archbishop*, 2010 WL 917200 (9th Cir. March 16, 2010). In so doing, the court confirmed that the claimant need not be an ordained minister for the ministerial exception to apply. Rather, the Ninth Circuit adopted a three-part test, holding that an individual is a minister for purposes of the ministerial exception if he or she: (1) is employed by a religious institution; (2) was chosen for the position based "largely on religious criteria"; and (3) performs some religious duties and responsibilities. An individual that meets these criteria is a minister for purposes of the ministerial exception. *Id.*

Under the definition adopted in *Rosas*, Ms. Erdman qualifies as a minister. As set forth in her job description, among Ms. Erdman's regular duties were to meet with the Executive Council to develop and implement the vision, goals and strategies of the stewardship team and the church as well as to provide strategic leadership, research and process management to stewardship". CP 819-820. The Executive for Stewardship is described as a "leader in the development of the church's philosophy, mission, strategic vision and business plan". CP 820. The concept of stewardship is founded in theology and doctrine within the PCUSA. The BOO defines stewardship as follows:

> Giving has always been a mark of Christian commitment and discipleship. The ways in which a believer uses God's gifts of material goods, personal abilities and time should reflect a faithful response to God's self-giving in Jesus Christ and Christ's call to minister to and share with others in the world. Tithing is a primary expression of the Christian discipline of stewardship. BOO W-5.5004.

Presbytery urges this Court to affirm an inclusive definition of "minister" which focuses on the function of the position rather than on either job title or ordination status. *See, e.g., Fontana, supra* at 426 and cases cited therein. Congregations within the PCUSA carry out their mission and purpose with the leadership of critical lay employees and elders working in tandem with ordained pastors. Ms. Erdman, as a

member of the CHPC Executive team, as an ordained elder and as the individual charged with Stewardship in a large congregation, was selected on largely religious criteria as reflected in her job description. CP 819-820. Moreover, her job duties included religious duties and responsibilities in connection with stewardship mission of CHPC. *Id.* As such, she meets the definition of "minister" under a *Rosas*-type standard.

3. The Exemption for Religious Organizations Under the WLAD Is Constitutional.

Ms. Erdman's claims asserted under the Washington Law Against Discrimination ("WLAD"), RCW Ch. 49.60 were properly dismissed as religious organizations are exempt from the definition of employer. RCW 49.60.040(3). The Washington Supreme Court has affirmed that nonprofit religious employers are exempt from all provisions of the WLAD. *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 673, 807 P.2d 830 (1991). *See also City of Tacoma v. Franciscan Foundation*, 94 Wash.App. 663, 972 P.2d 566 (1999); *MacDonald v. Grace Church Seattle*, 457 F.3d 1079 (9th Cir. 2006) (interpreting Washington law). Ms. Erdman remarkably argues that the long-standing religious organization exemption under the WLAD is unconstitutional.

Presbytery will not repeat the persuasive arguments made by CHPC/Toone. It adds only that the purpose of the exemption for

employment decisions made by religious organizations is to avoid impermissible entanglements in matters of church doctrine and theology as protected by the First Amendment. Indeed, contrary to the argument raised by Ms. Erdman here, **without** the exemption for religious organizations, the WLAD would be unconstitutional under both the First Amendment and the Washington Constitution, Art. 1, §11.

The issue of employment of lay individuals in church leadership positions is one that goes to the heart of church doctrine and theology. The 1987 the US Supreme Court decision in *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) is particularly instructive in its analysis of the constitutionality of the exemption for religious discrimination by religious organizations under Title VII. In *Amos*, the Supreme Court undertook an analysis under the three-part test under *Lemon v. Kurtzman,* 403 U.S. 602 (1971), in upholding the constitutionality of the Title VII religious discrimination exception for religious organizations. As the *Amos* court noted, "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions". *Amos, supra* at 335. "A law is not unconstitutional simply because it *allows* churches to advance religion,

which is their very purpose". *Id.* at 338. As Justice Brennan stated in his concurrence in *Amos*:

> Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well. *Id.* at 342.

By not including religious organizations in the definition of "employer", the Washington Legislature recognized the constitutional need to avoid governmental interference with decisions regarding whom a church employs. The irretrievable brokenness of the relationship between Ms. Erdman and CHPC over matters of church discipline, church polity and compliance with the BOO are precisely the types of religious issues of doctrine and theology from which the government is prohibited from interfering and which underscore the vital importance of the exemption under the WLAD.

B. THE TRIAL COURT PROPERLY LIMITED DISCOVERY OF PRESBYTERY INVESTIGATIVE COMMITTEE DOCUMENTS AND TESTIMONY OF ITS CHAIR

Ms. Erdman argues that "religious organizations are not immune from discovery". Ms. Erdman completely misrepresents the nature of the discovery dispute to which it assigns error. **The Presbytery never took**

the position that "religious organizations were immune from discovery." To the contrary, the Presbytery objected only to producing seven specific documents, each of which reflected the analysis or thought process of the IC forming the basis for its decision not to file charges. CP 93-94. In withholding these documents, the Presbytery asserted that the documents went to matters of church doctrine and theology, revealing the inner workings of an ecclesiastical tribunal. *Id.*

It is important to note that the Subpoena issued by Ms. Erdman was broad in scope. CP 88. The Presbytery nevertheless responded to that subpoena by producing nearly 150 pages of documents, including all documents reviewed by the IC, the list of witnesses interviewed, all emails sent to the committee and the correspondence by the IC to the parties, along with its final decision. CP 94.

1. The Work of an Ecclesiastical Tribunal is Entitled to Constitutionally-Protected Autonomy

An inquiry by a civil litigant into the internal process of the Presbytery IC is directly contrary to the protections afforded by the First Amendment which require separation of church and state. Under *Milivojevich* and *Elvig*, *supra*, Ms. Erdman is constitutionally prohibited from challenging the Presbytery's ecclesiastical tribunal, the IC, in a civil court. Ms. Erdman's inquiry into the internal process of the Presbytery

IC is therefore entirely irrelevant in a civil action and discovery of the process impermissible under the First Amendment. Mandatory discovery of the underlying basis for the IC's decision would have created a constitutionally impermissible *entanglement* with religion directly prohibited by the Establishment Clause. As the U.S. Supreme Court observed, "[i]t is not only the conclusions that may be reached by an agency which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979).[12]

Indeed, the IC was formed and acted under the provisions of the BOO. The Form 26 charges filed by Ms. Erdman by their terms expressly invoked various passages of scripture as authority and contended that Rev. Toone violated Holy Scripture and the PCUSA Constitution. As such, any inquiry into to the process of the IC, including documents created by the IC in its investigation, are peculiarly within the province of protected religious activity, involving matters of church doctrine, ecclesiastical process and theology. Moreover, were the trial court to have ordered the Presbytery to disclose documents reflecting why the IC made a particular

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[12] *Accord. EEOC v. Catholic University of America*, 83 F.2d 45, 466 (D.C. Cir. 1996), (potential for lengthy pre-trial proceedings, including discovery that could subject church personnel and records to subpoena, discovery and cross-examination in an action challenging the criteria for tenure at a Catholic university, was sufficient to warrant dismissal). *See also Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985).

decision within the strictures of the BOO and under the authority of the Holy Bible, such an Order would violate not only the First Amendment, but would violate the Washington Constitution, Art.1, §11 as well.

2. The Trial Court Utilized an Appropriate Balancing Analysis Under *Snedigar*

Washington courts have developed a process for dealing with discovery issues in the context of First Amendment protections. In *Snedigar v. Hoddersen*, 114 Wn.2d 153, 786 P.2d 781 (1990), the Washington Supreme Court stated that once a party which is subject to a subpoena has shown some **probability** that its First Amendment rights will be harmed by disclosure of facts, the burden then shifts to the party seeking discovery to establish the relevancy and materiality of the information sought and to make a showing that reasonable efforts to obtain the information by other means have been unsuccessful. *Id.* at 164. Similarly, in *Eugster v. City of Spokane*, 121 Wash. App. 799, 807, 91 P.3d 117 (2004), the Court of Appeals noted that, once there is a showing that First Amendment rights will be harmed by the disclosure, the burden shifts to the party seeking discovery to establish (1) the relevance and materiality of the information sought, and (2) that reasonable efforts to obtain the information by other means have been unsuccessful. *Id.* at 807. Further, the Court stated that, even if both of these required showings are

made, the Court still must balance the claim of privilege against the need or disclosure to determine which is the strongest. *Id.*

Ms. Erdman argues that the Presbytery did not have a First Amendment association privilege, therefore *Snedigar* did not apply. Although *Snedigar* arose in the context of a First Amendment freedom of association privilege, there is nothing in the opinion that expressly limits its application to a First Amendment freedom of association context. *Snedigar* stands for the proposition that once **potential** First Amendment protections are invoked, as they clearly were here, the burden shifts to the party seeking discovery to show both that the requested discovery is **essential**, not merely **ancillary**, to the central issue **and** that there is no other means of obtaining the requested information.

Ms. Erdman stated that she needed the information to establish that "an ecclesiastical tribunal **investigated** and **resolved**" the charges she brought. CP 78 (emphasis in original). The May 27, 2008 correspondence produced by Presbytery and received by the parties provided ample proof that the charges were in fact investigated and resolved.[13] Moreover, Presbytery had already produced to plaintiff all documents considered by the IC. There was no reasonable dispute that investigation and resolution had in fact taken place.

Ms. Erdman cites *TS v. Boy Scouts of America*, 157 Wn.2d 416, 138 P.3d 1053 (2006), for the proposition that the *Snedigar* balancing test only applies after making the threshold determination of whether a privilege shields the matter from disclosure and then argues that no privilege applied here. According to Ms. Erdman's argument, the First Amendment privilege: "only arises when a secular court makes a determination second-guessing a tribunal's decision concerning selecting its ministers and the interpretation of church doctrine of religious belief." App. Brief at 45. This argument makes no sense. The inquiry regarding discovery is not into what the **court** determines, but what **effect the discovery will have on the First Amendment rights of the party against whom the discovery is sought.** In the context of discovery sought from a religious organization, particularly an organization not a party to the underlying suit, the focus is on whether the request itself seeks discovery—by document or deposition--that would compel that organization to **reveal matters of church doctrine or theology** and thereby invoke First Amendment issues.

The Presbytery asserted a First Amendment privilege because the documents and deposition discovery sought by Ms. Erdman attempted to "pull back the curtain" to examine the analysis of an ecclesiastical

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[13] CP 980-981.

tribunal—the "why" of its decision. Allowing discovery into **why** the IC made a particular decision and allowing unfettered deposition of its volunteer members has a potentially chilling effect on the work of an ecclesiastical tribunal and goes directly to interpretation of church doctrine and religious belief. *Cf. C.J.C. v. Corporation of Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999) (ruling allowing action to proceed predicated on finding that liability did **not** involve interpretation of church doctrine or religious beliefs and therefore did not offend constitutional principles). As such, an order compelling such disclosure would constitute an impermissible entanglement under the First Amendment. *See NLRB v. Catholic Bishop of Chicago, supra.* Thus, unlike *T.S. v. Boy Scouts*, a First Amendment privilege clearly exists here and therefore, the *Snedigar* analysis comes into play.

Ironically, Ms. Erdman argues that conducting discovery of the Presbytery IC does not infringe upon the Presbytery's First Amendment rights or entangle the court in ecclesiastical matters. At the same time, however, she contends that she needs the requested discovery to determine: (1) the breadth and depth of the investigation of the IC; (2) the scope of the tribunal's interviews with witnesses, (including Ms. Erdman); (3) the information relied upon by the IC; (4) the Presbytery's business relationship with CHPC; and (5) the purpose of the committee. The only

logical reason for Ms. Erdman's desire to go into these issues at all is either for the purpose of attacking the work of the IC, which is unconstitutional and impermissible under *Milivojevich*, or to obtain information either irrelevant or already available to Ms. Erdman, which limits her need and right to the discovery under S*nedigar*.

Given the clear implication of First Amendment concerns regarding internal workings of the IC, the availability of relevant, non-privileged information from other sources, the fact that the trial court specifically reviewed the documents before ruling on their disclosure, and the court's allowance of the deposition of the IC Chair, the trial court's rulings on discovery issues as to Presbytery cannot reasonably be considered an abuse of discretion.

IV. CONCLUSION

For the reasons set forth above, *amicus curiae* Presbytery of Olympia urges this Court to affirm the trial court rulings at issue.

Dated this 9th day of April, 2010.

Respectfully submitted,

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By _____
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CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of April, 2010, I filed via ABC/LMI Legal Messenger an original and one copy of the ***AMICUS CURIAE*** **BRIEF OF PRESBYTERY OF OLYMPIA** with the Court of Appeals, Division II and caused to be delivered no later than April 13, 2010 also via Legal Messenger a copy of the same to:

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Dated in Tacoma, Washington this 12th day of April, 2010.

Cheryl Koubik, Secretary